STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RAFAEL R. FINLEY,

Defendant-Appellant.

UNPUBLISHED
July 24, 2001

No. 209381
Oakland Circuit Court
LC No. 97-150697-FH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

VICKIE LYNN HOSKINS,

Defendant-Appellant.

No. 209383
Oakland Circuit Court
LC No. 97-150699-FH

Before: Doctoroff, P.J., and Saad and Wilder, JJ.

PER CURIAM.

Defendants Rafael Finley and Vickie Hoskins were tried jointly before separate juries and were each convicted of one count of conspiracy to deliver 50 or more but less than 225 grams of cocaine, MCL 750.157(a), MCL 333.7401(2)(a)(iii), three counts of delivery of 50 or more but less than 225 grams of cocaine, MCL 333.7401(2)(a)(iii), and two counts of possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv). Defendant Finley was sentenced to consecutive prison terms of five to thirty years' imprisonment for the conspiracy conviction, five to thirty years' imprisonment for each of the delivery convictions, and one to thirty years' imprisonment for the possession with intent to deliver conviction. Defendant Hoskins was sentenced to consecutive prison terms of five to twenty years' imprisonment for the conspiracy conviction, five to twenty years' imprisonment for each of the delivery convictions, and one to twenty years' imprisonment for each of the possession with intent to deliver

convictions. Both defendants appeal as of right. We affirm, but remand to correct a clerical error in each defendant's judgment of sentence.[1]

Docket No. 209381 (Defendant Finley)

Defendant argues that his statement to the police was involuntary. We disagree. Although defendant claims that his confession was improperly induced by a promise of leniency, Officer Giroux testified that he never promised anything to defendant in exchange for his statement and the trial court specifically found that "no promises were made to this Defendant before he made his statement." Affording deference to the trial court's assessment of the credibility of the witnesses, we find no clear error in the trial court's determination that defendant was not promised anything in exchange for his statement. *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000); *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988). Further, while defendant claims that he was intimidated by the police because he was only eighteen years old and had only a tenth grade education at the time he was interrogated, we agree with the trial court that the circumstances surrounding the interrogation reveal that defendant knowingly and voluntarily waived his *Miranda*[2] rights.

Also, defendant contends that he was denied a fair trial because the prosecutor misstated the law in closing argument by remarking that knowledge of the amount is not an element of the conspiracy offense and because the trial court's jury instructions concerning the elements of conspiracy were inadequate. Because defendant did not preserve these issues with an appropriate objection at trial, we review these issues for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999). Here, viewed in context, it is apparent that the prosecutor's statement was made in reference to the charge of delivery of a controlled substance, not the conspiracy charge. As such, the prosecutor's statement was not plainly erroneous. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999); *People v Northrop*, 213 Mich App 494, 498; 541 NW2d 275 (1995); see also *People v Mass*, 238 Mich App 333; 605 NW2d 322 (1999), lv gtd 462 Mich 877 (2000). Second, the record reveals that the trial court instructed the jury on conspiracy in accordance with CJI2d 10.3, and we find no plain error with this instruction. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994).

Further, defendant says that there was insufficient evidence to support his conviction for conspiracy to deliver 50 or more but less than 225 grams of cocaine. We disagree. A conviction of conspiracy to possess with intent to deliver a controlled substance requires proof of the following elements: (1) the defendant possessed the specific intent to deliver the statutory minimum as charged; (2) his coconspirators possessed the specific intent to deliver the statutory minimum as charged; and (3) the defendant and his coconspirators possessed the specific intent

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[1] Each judgment of sentence incorrectly contains a statutory citation for the conspiracy conviction which refers to a conspiracy involving 225 grams or more but less than 650 grams of cocaine, MCL 333.7401(2)(a)(ii), even though both defendants were convicted only of a conspiracy involving the lesser amount of 50 or more but less than 225 grams of cocaine.

[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

to combine to deliver the statutory minimum as charged to a third person. *People v Justice (After Remand)*, 454 Mich 334, 349; 562 NW2d 652 (1997).

Here, direct and circumstantial evidence, and reasonable inferences therefrom, viewed most favorably to the prosecution, established that defendant was part of a conspiracy with codefendant Hoskins and Eric Videau to deliver 50 or more but less than 225 grams of cocaine to Trooper Wiegand on December 10, 1996. The evidence showed that defendant and codefendant Hoskins used the same pager to arrange drug sales, and that, when Wiegand paged that number, codefendant Hoskins frequently returned the page. The evidence also showed that Hoskins accompanied defendant when defendant sold cocaine to Wiegand on previous occasions. Moreover, there was evidence that defendant consulted with Hoskins about the quantity and pricing of the cocaine regarding the transactions on November 27 and December 9. Telephone logs also showed that there was frequent contact between Videau and defendant and codefendant Hoskins just before December 10.

Additionally, the evidence indicated that, on December 10, while defendant and Videau were inside the residence packaging the cocaine, Hoskins went to the store to purchase baking soda, which was to be used to dilute the cocaine, because they were several grams short of the eight ounces promised to Wiegand. Further, during the search on December 10, the police seized drug tally sheets in the kitchen of defendant and Hoskins' residence and also seized a large amount of money from Videau, which including pre-recorded funds that had previously been given to defendant by Wiegand on December 2 and 9. Further, in his statement to the police, defendant admitted that Videau supplied him with the cocaine that he sold to Wiegand. The evidence, viewed in a light most favorable to the prosecution, was sufficient to enable a rational trier of fact to conclude beyond a reasonable doubt that defendant conspired with codefendant Hoskins and Videau to deliver 50 or more but less than 225 grams of cocaine to Wiegand on December 10. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich. 1201 (1992).

Defendant also claims that the trial court erred when it allowed the prosecutor to introduce evidence about personal property seized by the police from his residence and evidence that he had a suspended driver's license. Because defendant did not object to this evidence at trial on the same ground that he now raises on appeal, this issue is not preserved. *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996). Accordingly, defendant must show plain error affecting his substantial rights. *Carines*, *supra* at 764-765. Contrary to defendant's claim, the challenged testimony was not irrelevant, MRE 401, nor was its probative value substantially outweighed by the danger of unfair prejudice, MRE 403. The evidence regarding defendant's personal property, considered in conjunction with the fact that neither defendant nor codefendant Hoskins was legally employed, was probative of whether defendant was earning large sums of money through drug trafficking. In addition, the testimony that defendant had a suspended driver's license was probative of the prosecutor's theory that defendant and Hoskins had conspired to sell drugs, and that Hoskins drove the car when they transported the drugs so as not to risk a search of their vehicle in the event they were stopped for a traffic violation.

Docket No. 209383 (Defendant Hoskins)

Defendant Hoskins argues that the evidence at the preliminary examination was insufficient to bind her over for trial on the charged offenses, with the exception of one delivery charge, and that the trial court therefore abused its discretion by denying her motion to quash. Because defendant has failed to provide a transcript of the preliminary examination hearing, despite a request from this Court, she has waived consideration of this issue. *People v Coons*, 158 Mich App 735, 740; 405 NW2d 153 (1987).

Also, the trial court did not abuse its discretion in denying defendant Hoskins' motion to dismiss. *People v Adams*, 232 Mich App 128, 132; 591 NW2d 44 (1998). Defendant failed to offer any factual support for her claim that she entered into a cooperation agreement with law enforcement authorities whereby she agreed to provide information about drug trafficking activities in exchange for dismissal of the charges.

Defendant Hoskins also asserts that the trial court erred in failing to order separate trials for her and codefendant Finley. However, the record indicates that defendant expressly consented to being tried jointly with codefendant Finley. By agreeing to a joint trial, defendant waived any claim of error. *People v Carter*, 462 Mich 206, 215, 218-219; 612 NW2d 144 (2000). Similarly, the record indicates that defendant affirmatively approved of the admission of codefendant Finley's statement. Therefore, any claim of error concerning the admission of this statement is likewise waived. *Id.*

Also, defendant contends that the evidence was insufficient to support her convictions, and that the trial court erred in denying her motion for a directed verdict. We disagree. As previously discussed, sufficient evidence was presented to enable a rational trier of fact to conclude beyond a reasonable doubt that defendant Hoskins conspired with codefendant Finley and Videau to deliver between 50 and 225 grams of cocaine to Trooper Wiegand on December 10. Further, the evidence showed that defendant aided and abetted Finley in his drug sales to Wiegand on November 26 and 27, and December 2, 9 and 10, 1996. Specifically, while Wiegand was waiting for Finley at the meeting point for the first transaction on November 26, it was defendant who called to report that they (defendant and Finley) would be arriving shortly. Further, the evidence showed that defendant drove Finley to the location of the drug sales on November 26 and December 9, 1996, and that she was again present at the sale at defendant's and Finley's residence on November 27.

Further, on December 2, defendant was observed driving up and down the parking aisles of the Summit Place Mall as Finley completed the drug transaction for three ounces of cocaine. Although defendant was not present at the time the police executed the search warrant at her and Finley's residence on December 10, she was present beforehand, while the cocaine was being packaged, and, when she was arrested after returning home, she had a box of baking soda in her possession, and the evidence indicated that baking soda had been used to dilute cocaine on a prior occasion. Viewed most favorably to the prosecution, the evidence was sufficient to support defendant's convictions, and the trial court properly denied defendant's motion for a directed verdict of acquittal. *Wolfe*, *supra* at 515.

Contrary to defendant's next assertion, the trial court's failure to give her requested cautionary instruction does not require reversal. The trial court instead instructed the jury in accordance with CJI2d 4.1, which sufficiently protected defendant's rights. *Daniel*, *supra* at 53.

Defendant also alleges that the prosecutor's statement during closing argument that she was in possession of the cocaine on December 10 was not supported by the evidence. Because defendant did not object to the prosecutor's statement at trial, appellate relief is precluded absent a showing of plain error affecting defendant's substantial rights. *Carines, supra* at 764-765. Because possession may be either actual or constructive, and because the evidence and reasonable inferences arising from the evidence supported an inference of constructive possession, we conclude that plain error has not been shown. *Wolfe, supra* at 520-521.

Finally, we reject defendant's claim that her sentences amount to an abuse of discretion. Defendant faced mandatory consecutive minimum sentences totaling forty-two years combined for her convictions. As it turned out, the trial court deviated downward from the mandatory minimum terms for substantial and compelling reasons, MCL 333.7401(4), imposing consecutive sentences with a combined minimum total of twenty-two years. We find no merit to defendant's claim that the trial court's refusal to deviate further constituted an abuse of discretion. *People v Fields*, 448 Mich 58, 76-77; 528 NW2d 176 (1995). Furthermore, defendant's sentences do not violate the principle of proportionality. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

Affirmed, but remanded for the limited purpose of correcting a clerical error in each defendant's judgment of sentence to reflect the proper statutory citation for the conspiracy conviction, showing that each defendant was convicted of a conspiracy involving only 50 or more but less than 225 grams of cocaine. MCL 333.7401(2)(a)(iii). We do not retain jurisdiction.

/s/ Martin M. Doctoroff
/s/ Henry William Saad
/s/ Kurtis T. Wilder